IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 4, 2009 Session

EMILY STEWARD v. WILLIAM F. SMITH, III, a Minor, ET AL.

Direct Appeal from the Circuit Court for Dickson County
No. CV2326 Robert E. Burch, Judge

No. M2009-00048-COA-R3-CV - Filed September 14, 2009

This tort action arises from an automobile accident. Defendants admitted liability, but appeal the jury's award of damages in the amount of $76,792 to Plaintiff. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Samuel R. Anderson and Amanda G. Branam, Chattanooga, Tennessee, for the Appellants, William E. Smith, III, and Julie Ann Smith.

Jonathan L. Griffith, Nashville, Tennessee, for the Appellee, Emily Steward.

Joshua Gerald Offutt, Nashville, Tennessee, for unnamed Appellee, Mountain Laurel Assurance Company.

OPINION

This action arises from a motor vehicle accident on December 26, 2005, between a vehicle operated by Plaintiff Emily Steward (Ms. Steward) and one operated by William F. Smith, III (Mr. Smith) a minor. On December 27, 2006, Ms. Steward filed a complaint in the Circuit Court for Dickson County against Mr. Smith and his mother, Julie Ann Smith (Ms. Smith; collectively, "the Smiths"), who was presumed to be the owner of the Smith vehicle. In her complaint, Ms. Steward alleged she was traveling southbound in the southbound lane of Highway 46 in Dickson County when she was struck by a vehicle operated by Mr. Smith as he attempted to make a left-hand turn from the northbound lane. She alleged the collision was directly and proximately caused by negligence on the part of Mr. Smith. Ms. Steward prayed for compensatory damages arising from past and future pain and suffering; past and future medical expenses; property damages; loss of

enjoyment of life; permanent impairment; emotional suffering and grief; lost wages; and general relief.

The Smiths answered, denying allegations of negligence. They further asserted the affirmative defenses of failure to state a claim on which relief may be granted and comparative fault. The Smiths also served notice pursuant to Tennessee Code Annotated § 24-5-113 of their intent to rebut the presumption of the reasonableness and necessity of Ms. Steward's medical bills and demanded a jury to try the cause. In August 2008, the parties filed an agreed stipulation wherein the Smiths admitted 100 percent liability with no allegations of comparative fault, and the matter proceeded to trial on the issue of damages.

The jury heard the matter in September 2008 and awarded Ms. Steward damages in the amount of $76,792. The trial court entered its order on the jury verdict in October 2008. In November 2008, the Smiths filed a motion for new trial or remittitur, asserting counsel for Ms. Steward improperly had made reference to insurance coverage during the trial of the matter, and that the preponderance of the evidence weighed against the damages awarded by the jury. Following a hearing in December 2008, the trial court denied the Smiths' motion. The Smiths filed a timely notice of appeal to this Court.

Issues Presented

The Smiths raise the following issues for our review, as we slightly reword them:

(1) Whether the trial court erred by denying Defendants' motion for mistrial and subsequent motion for new trial.

(2) Whether the jury rendered a verdict that was so excessive as to evidence passion, prejudice, or caprice, requiring a remittitur.

Standard of Review

On appeal from a jury trial, we will not set aside the jury's findings of fact unless there is no material evidence to support the verdict. *Childress v. Union Realty Co.*, 97 S.W.3d 573, 576 (Tenn .Ct. App. 2002); Tenn. R. App. P. 13(d). Upon review, this Court will not re-weigh the evidence, but will take the strongest view possible of the evidence in favor of the prevailing party, and discard evidence to the contrary. *Id.* We will allow all reasonable inferences to uphold the jury's verdict, setting it aside only if there is no material evidence to support it. *Id.* Our review of the trial court's conclusions of law in a jury trial, however, is *de novo* upon the record, with no presumption of correctness. Tenn. R. App. P. 13(d); *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 28 (Tenn. 1996).

Discussion

On appeal, the Smiths assert that, during *voir dire* and the trial of this matter, counsel for Ms. Steward improperly referenced liability insurance, and that these references biased the jurors and resulted in an excessive award of damages to Ms. Steward. Smiths assert that counsel's references to insurance were "both intentional and cumulatively prejudicial." They additionally assert that the prejudicial effects of counsel's references were reflected in the jury's damage award, which they submit was in excess of the amount requested in counsel's closing statement. Smiths argue that, in light of counsel's intentional introduction of evidence relating to insurance, the trial court erred by denying their oral motion for mistrial and motion for new trial. They further argue that the jury's award of damages was excessive and clearly the result of bias created by the introduction of evidence of insurance. We turn first to whether the trial court erred in denying the Smiths' motions for a mistrial and for a new trial.

Motions for Mistrial and New Trial

The Smiths assert the trial court should have granted their oral motion for a mistrial and post-judgment motion for a new trial because counsel for Ms. Steward willfully referred to liability insurance protection in order to prejudice the jury in his client's favor. They further assert that the jury's award of damages in an amount greater than that suggested by Ms. Steward's counsel in his opening statement demonstrates that counsel was successful in these efforts.

In Tennessee, evidence of insurance that protects a defendant from the liability asserted against him is inadmissible. *West End Recreation, Inc. v. Hodge*, 776 S.W.2d 101, 104 (Tenn. App. 1989)(citations omitted). A mistrial should be granted if "an attorney willfully and voluntarily refers to liability insurance for the purpose of influencing a jury." *Id.* It is within the sound discretion of the trial court, however, to determine whether the plaintiff has intentionally injected the question of insurance to the prejudice of the defendant. *McClard v. Reid*, 229 S.W.2d 505, 506 (Tenn. 1950). An abuse of discretion occurs where the trial court has applied an incorrect legal standard or where its decision is illogical or unreasoned and causes an injustice to the complaining party. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004).

When considering a motion for a new trial, the trial court must act as a "thirteenth juror" and independently weigh the evidence, determine the issues presented, and decide whether the jury's verdict is supported by the evidence. *Dickey v. McCord*, 63 S.W.3d 714, 718 (Tenn. Ct. App. 2001). After weighing the evidence, if the trial court is satisfied with the jury's verdict, it must approve the verdict. *Id.* On the other hand, if the trial court is not satisfied with the verdict, it must grant a new trial. *Id.* The trial court must perform its role as thirteenth juror without regard or deference to the verdict of the jury. *Id.* When the trial court approves the jury's verdict without comment, the appellate court presumes it properly performed its duty as the thirteenth juror. *Id.* Appellate courts historically have afforded wide discretion to a trial court's decision regarding whether to grant a new trial. *E.g., Wasielewski v. K Mart Corp.*, 891 S.W.2d 916, 918 (Tenn. App. 1994); *Mize v. Skeen*, 63 Tenn. App. 37, 468 S.W.2d 733, 736 (Tenn. App. 1971).

In this case, Ms. Steward's counsel first injected the possibility of insurance coverage during *voir dire*, when he questioned potential jurors about the settlement or resolution of "claims" following automobile accidents and asked one potential juror "what if you didn't have health insurance and the doctor told you . . . ." He further questioned potential jurors regarding whether they knew, worked with, or were related to "anyone that is involved in the insurance industry; close friend, family member, agents, adjuster, anybody, have stock, hopefully not in AIG, in any insurance company." Ms. Steward's counsel also asked whether any of the potential jurors were related to "any lawyers or paralegals that work for insurance companies." Following objection from counsel for the Smiths, the trial court held two discussions with counsel off the record regarding this line of questioning.

During the trial of the matter, Ms. Steward's counsel questioned her regarding photographs taken of her vehicle after the accident and asked: "Did you take this picture?" Ms. Steward responded: "No, I think Allstate . . ." Counsel interrupted, saying: "Stop, stop, stop, no, no, no." Counsel for the Smiths interjected with: "Your Honor." Following another off-the-record discussion between counsel and the trial court, a bench conference was held on the record and counsel for the Smiths moved for a mistrial on the basis that it would be obvious to the jury that he worked for Allstate and that the matter involved insurance coverage. The trial court concluded that a curative instruction to the jury would be sufficient, and stated:

> I generally tell them that they, using common experience and common sense, know that one or both of these drivers were insured, had liability insurance, because that is a common experience of people. Then I will instruct them that the fact that [a] person has insurance is of no consequence.
>
> The damage[s] suffered by a person are not one dollar less nor one dollar more because of the fact of insurance. And if you discuss insurance during your deliberations you are violating your oath.

The Smith's counsel thanked the court, and the trial court issued the curative instruction when the hearing recommenced. The trial court stated:

> Ladies and gentlemen, just before you were excused the witness made a reference to a particular insurance company. Now, we don't mention insurance during trial because it is not relevant.
>
> . . . you have enough intelligence to know that it is very likely tha[t] one or both of these drivers have insurance, most drivers have insurance, that is just common sense and everyday experience.

> So . . . nothing earth shaking has been told. The reason we don't discuss insurance is because it is not relevant. It has no bearing on any issue that comes before you. If you stop and think about it we are not trying liability in this case.
>
> . . . .
>
> Is a person more or less injured because they have insurance or don't? Again, it is just - - what is at issue is liability and what are the damages to the plaintiff, if anything, that are caused by this accident?
>
> And that inquiry is not aided one bit by the fact that one or both of these drivers had insurance. It is just simply not relevant. The fear is if somebody in the jury finds out that they have insurance that the jury will go wild and give thousands of dollars because there is insurance.
>
> . . . if you consider the fact that they have insurance in setting these damages you are violating your oath. If you even discuss insurance back in the jury room, you are violating your oath as a juror. I instruct you not to do that. Can you all do that? Thank you.
>
> Upon direct examination of Ms. Steward, her counselor asked:
>
> I want you to now explain to this jury why you have had gaps in treatment and why you are not currently treating with a doctor.
>
> Ms. Steward replied: "Because I have no health insurance."

The Smiths' counsel promptly objected, and the trial court granted a continuing objection. Ms. Steward's counsel further questioned her regarding why she did not go to see an orthopedic surgeon, and Ms. Steward replied, "[b]ecause he wouldn't see me because he said that I didn't have health insurance." The trial court sustained the Smiths' objection based on hearsay.

The trial court's jury instructions in this case followed particularized discussion with counsel and were given to the jury without objection. The trial court's instructions with respect to the existence of insurance reflected those given orally at the hearing of the matter. The trial court instructed the jury that "[t]here [was] no evidence before [it] that any party has or does not have automobile liability insurance" and that it "may not discuss automobile liability insurance or speculate about insurance, based on your general knowledge." The trial court further instructed, "[a] party is no more or less likely to be negligent because a party does or does not have insurance. Injuries and damages, if any, are not increased or decreased because a party does or does not have insurance."

As we have long observed,

> the custom of automobile owners in carrying liability insurance against loss or damage has become so general that jurors must be assumed to be cognizant of the fact, and the tendency to refuse reversals for bringing before a jury the carrying of indemnity insurance by the defendants is proper, especially where it appears that no improper practice has been resorted to.

Colwell v. Jones, 346 S.W.2d 450, 456 (Tenn. App. 1961)(citing *Lasater Lumber Co. v. Harding*, 189 S.W.2d 583, 588 (Tenn. App. 1945)). The question in this case, as we perceive it, is whether the trial court abused its discretion when it determined that counsel for Ms. Steward did not intentionally insert the question of liability insurance into the proceedings for improper purpose. Upon review of the record, we cannot say the trial court abused its discretion when it denied the Smiths' motions for a mistrial and new trial.

Remittitur

We next turn to whether the trial court erred by denying the Smiths' motion for remittitur. As noted above, the Smiths contend that the jury's award of damages in the amount of $76,792 could only result from prejudice and bias where Ms. Steward's counsel told the jury in opening and closing statements that the evidence supported damages in the amount of $46,792. The determination of damages in a personal injury case is within the province of the jury. *Grandstaff v. Hawks*, 36 S.W.3d 482, 499 (Tenn. Ct. App. 2000). Trial courts may suggest adjustments to the jury's award of damages when they believe them to be inadequate (suggesting additur) or excessive (suggesting remittitur). *Coffey v. Fayette Tabular Prods.*, 929 S.W.2d 326, 331 (Tenn. 1996). Compensatory damages in a personal injury or wrongful death action may include both economic and non-economic damages. Non-economic damages include pain and suffering, permanent impairment, disfigurement, and past and future loss of enjoyment of life. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999). Damages for pain and suffering include both the physical and mental discomfort caused by an injury. *Id.*

Appellate courts review a trial court's decision regarding remittitur under the standard of review set forth in Tennessee Rule of Appellate Procedure 13(d), presuming the trial court's finding to be correct unless the evidence preponderates otherwise. *Coffey*, 929 S.W.2d at 331. Although appellate courts may suggest a remittitur where the trial court has not, our authority is "more circumscribed" than that of the trial court. *Id.* Where the trial court, in its role as thirteenth juror, has approved a jury verdict, that verdict will not be disturbed where there is any material evidence to support it. *Id.* n.2.; *Dunn v. Davis*, No. W2006-00251-COA-R3-CV, 2007 WL 674652, at *9 (Tenn. Ct. App. Mar. 6, 2007) (*no perm. app. filed*). We must, therefore, review the evidence in this case to determine whether material evidence supports a finding that the jury award is within the range of reasonableness and not excessive. *Dunn*, 2007 WL 674652, at *9 (citing *see Hand v. Norfolk So. Ry. Co.*, No. 03A01-9704-CV-00123, 1998 WL 281946, at *11 (Tenn. Ct. App. June 2, 1998), *perm. app. denied* (Tenn. Nov. 2, 1988)).

The jury in this case awarded the following damages:

past medical care and services:	$11,292
future medical care and services:	$30,000
past loss of earning capacity:	$500
past pain and suffering:	$10,000
future pain and suffering:	$10,000
permanent impairment/disfigurement	$5,000
past loss of ability to enjoy life:	$5,000
future loss of ability to enjoy life:	$5,000

Statements by counsel are not, of course, evidence. *E.g., Oakes v. Oakes*, 235 S.W.3d 152, 158 (Tenn. Ct. App. 2007). As the Smiths assert, however, the transcript in this case reflects that counsel for Ms. Steward stated in his opening remarks that Ms. Steward was "not seeking $100,000," and that "at the end of the day [he would] be asking [the jury] to return Ms. Emily Steward a verdict of $46,792." On the other hand, during his closing statement, counsel suggested damages in the amount of $10,000 for past pain and suffering; $10,000 to $25,000 for future pain and suffering; $5,000 to $7,500 for impairment and disfigurement; $5,000 to $10,000 for loss of enjoyment of life; $11,292 for past medical expenses; and $500 for loss of past earning capacity. With respect to future medical expenses, counsel asserted the medical testimony supported a finding of "something like $50,000," but added, "I am not asking for that." Counsel concluded, "[s]o the total here is, I told you at the very beginning, $46,792, if you think that is too much you will tell me, you will tell Emily, if you think that is not enough you will tell us that also."

As Ms. Steward notes, the Smiths did not request an independent medical examiner in this case. The medical evidence contained in the record includes the testimony of Lance McClure, D.C. ("Dr. McClure") and Koster Peters, M.D. ("Dr. Peters"). Dr. McClure testified that Ms. Steward had sustained chronic, permanent injuries to her shoulder and neck as a result of the accident, and that the injuries would affect her range of motion and "more than 50 percent of her shoulder." He testified that Ms. Steward, who had a remaining life expectancy of 49.9 years at the time of trial, would require a minimum of one treatment per month for a "permanent time," at a cost of $85 per treatment. He also testified that the charges billed by him at the time of testimony were $3,431.85. Dr. Peters testified that Ms. Steward's injuries "certainly could" limit her abilities and activities, including income-generating painting, where "she would be limited as to how high she could reach and stretch, and also limited by pain." The evidence also includes a statement of costs for treatment in the amount of $11,463.60. In light of the totality of the record, there is material evidence to support the jury's award of damages in this case.

Holding

In light of the foregoing, the judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellants, William F. Smith, III, and Julie Ann Smith, and to their surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE